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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/792,100

03/03/2004

Giuseppe Maio

1610-100

4098

30448

7590

06/18/2008

AKERMAN SENTERFITT

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EXAMINER

LANDAU, SHARMILA GOLLAMUDI

ART UNIT

PAPER NUMBER

1611

MAIL DATE

DELIVERY MODE

06/18/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/792,100	<b>Applicant(s)</b> MAIO ET AL.	
	<b>Examiner</b> Sharmila Gollamudi Landau	<b>Art Unit</b> 1611	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 10 April 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
- 4a) Of the above claim(s) 10 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

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### **DETAILED ACTION**

Receipt of Applicant's Amendments and Remarks filed 4/10/08 is acknowledged. Claims 1-10 are pending in this application. Claims 1-9 are directed to the elected invention. Claim 10 stands withdrawn.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

**Claims 1-8 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.**

Claim 1 has been amended to recite a composition comprising "comminuted solid polyisoprene" and an organic solvent, which is vague and indefinite. A solvent is a substance that dissolves another substance forming a solution. It is unclear how the polyisoprene product is in solid form when an organic solvent is added. Therefore, is it unclear if the polyisoprene is in a solid form in the final product or is in a solid form until the solvent is added. Further clarification is requested.

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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**Claims 1-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mougin et al (5,945,095) in combination with Gatto et al (US 2003/0195486) is withdrawn in light of the amendments of 1/18/08.**

**Claims 1-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Veeger et al (6,471,983) as evidenced by Kraton IR 401 brochure of record in view of Viladot (20030044469).**

Veeger teaches skin composition comprising a) 10-80% polyisoprene, b) 1-15% by weight of an organic solvent such as a hydrocarbon with 12-22 carbons (isododecane is C<sub>12</sub>), c) 0-10% by weight of at least one surfactant, d) 0-10% by weight of an abrasive, e) 0-1% by weight thickener, f) optionally cosmetic adjuvants and additives and/or active ingredients, g) 10-60% by weight water, to make a total of 100% by weight. See tables and claims. The isoprene utilized is Kraton IR 401. Veeger teaches the use of thickeners such as acrylic acid polymers and xanthan gum to modify the consistency of the composition. The surfactant may be a fatty alcohol ethoxylate. See column 2, lines 3-9. The composition may contain other actives such as emollients, care actives, etc.

Although Veeger teaches kaolin (clay) in the composition, Veeger does not teach the use of modified clay.

The Kraton IR 401 brochure discloses that Kraton IR 401 has a molecular weight of 1,500,000-2,500,000 and a particle size of 1.8 microns.

Viladot teaches a skin care composition comprising consistency factors and thickeners such as xanthan gum, polyacrylate polymers, disteardimonium hectorite (BENTONE), etc. see [0058]. Further, Viladot teaches conventional excipients including emulsifiers such as nonionic

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surfactants including wool wax and fatty alcohol ethoxylates. Other conventional excipients include silicone oils.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Veeger et al and Viladot and substitute the prior art's thickener with the instant thickener, disteardimonium hectorite. One would have been motivated to do so since Viladot teaches both Veeger's exemplified thickeners and instant thickener function as consistency factors in cosmetics. Moreover, a skilled artisan would have reasonably expected success since Veeger generally teaches using thickeners to modify the consistency of the cosmetic. Therefore, it would have been prima facie obvious for a skilled artisan to utilize the appropriate thickener since the prior art establishes the functional equivalency between both. Regarding claim 8, Veeger teaches the use of fatty alcohol ethoxylates as nonionic surfactants in the amount of 0-10% and Viladot teaches wool wax alcohols and fatty alcohol ethoxylates function as nonionic surfactants. Therefore, it would have been prima facie obvious for a skilled artisan to utilize the appropriate surfactant since the prior art establishes the functional equivalency between both.

### ***Response to Arguments***

Applicant argues that Veeger discloses a polyisoprene latex and the instant claim do not read on a polyisoprene latex. Applicant argues that Veeger does not provide the molecular weight of the latex and the brochure cited was published in September 2003, which does not constitute prior art. Applicant argues that Viladot does not cure the deficiencies of Veeger. Applicant argues that Viladot does not teach the polyisoprene and teaches compositions comprising microcapsules.

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Applicant's arguments filed 1/18/08 have been fully considered but they are not persuasive. First, it should be noted that latex is merely a description of rubber suspended in water. In instant case, Kraton IR 401 is solid particles of polyisoprene rubber suspended in water. Therefore, Kraton IR 401 does read on the instant recitation "communicated solid polyisoprene" since IR 401 is solid isoprene rubber particles suspended in water and the instant claims do not exclude water. It is further noted that the instant specification on page 3 discloses that Kraton IR polyisoprenes are suitable polyisoprene. Veeger also teaches the polyisoprene is in particle sizes. See column 1, lines 25-35.

Regarding the Kraton IR brochure, the examiner cites this document as evidence to demonstrate that Kraton IR 401 inherently has a molecular weight 1,500,000-2,500,000. Applicant's attention is directed to MPEP 2131.01 III: "Extra Reference or Evidence Can Be Used To Show an Inherent Characteristic of the Thing Taught by the Primary Reference." Regarding the date of the brochure, applicant's attention is directed to MPEP 2124: "In certain circumstances, references cited to show a universal fact need not be available as prior art before applicant's filing date. *In re Wilson*, 311 F.2d 266, 135 USPQ 442 (CCPA 1962). Such facts include the characteristics and properties of a material or a scientific truism."

Regarding Viladot, it is noted that applicant argues against the references individually and one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In instant case, the examiner relies on Vialdot to teach Veeger's thickeners and the claimed thickener (disteardimonium hectorite) are functional equivalents and one would expect similar results by

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substituting one functional equivalent for another. Note MPEP 2144.06 II. Applicant has not provided any unexpectedness of the instant thickener versus the prior art.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sharmila Gollamudi Landau whose telephone number is (571) 272-0614. The examiner can normally be reached on Monday- Friday (8:30-6).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Sharmila Gollamudi Landau/  
Primary Examiner, Art Unit 1611